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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

SCOTT EATON, Plaintiff and Appellant, v. KAWASAKI MOTORS CORP., U.S.A., et al., Defendants and Respondents.	G027575 (Super. Ct. No. 799579) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Jack K. Mandel, Judge. Affirmed.

Bruce J. Guttman; Schreiber & Schreiber, Edwin C. Schreiber and Eric A. Schreiber for Plaintiff and Appellant.

Wesierski & Zurek, Thomas W. Ely, Ronald F. Templer and Robert L. Kollar for Defendants and Respondents.

Scott Eaton appeals from a judgment entered in favor of Kawasaki Motors Corp., U.S.A., Kawasaki Motors Manufacturing Corp., U.S.A., Kawasaki Heavy Industries, LTD., and Pomona Valley Kawasaki, Inc. (collectively referred to as Kawasaki) in his products liability lawsuit. On appeal, Eaton contends the court

erroneously granted Kawasaki's motion in limine to exclude Eaton's experts from testifying about or presenting videotapes depicting live field testing conducted on the Colorado River. He also asserts that the court should have granted his motion for a new trial. Finding his arguments meritless, we affirm.

I

In 1997 Eaton was injured while using his 1996 Kawasaki Jet Ski model JS750-B2 in choppy water on the Colorado River near Blythe.[1] Although Eaton cannot remember the accident, his friend saw Eaton lose control in the water and do "cartwheels." During his tumble, 27-year-old Eaton was struck on the head and rendered a quadriplegic.

Eaton filed a products liability lawsuit against the parent company that designed the ski, the subsidiaries that manufactured and marketed the ski, and the retailer that sold it to Eaton. He alleged the ski had a design defect that caused it to be unstable, which directly caused his injuries. The case was set for trial on September 13, 1999. In May, Eaton moved for a continuance and postponement of expert designations. Trial was rescheduled for February 1, 2000.

In early December 1999, the parties designated their expert witnesses. Kawasaki indicated Yoshio Kaneuchi, who works for the company in Japan, would be their design defect expert and the most knowledgeable person on design issues. On December 10, Kaneuchi's deposition started at 9:15 a.m. and was stopped by Eaton's counsel at 7:00 p.m. because he was "exhausted" and suffering from "hand cramps." Kawasaki's counsel refused to continue the deposition to the following day (Saturday), because Kaneuchi had to fly back to Japan and return to work that Monday. Counsel

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[1] Jet Ski is a registered trademark of Kawasaki. Eaton's model required the operator to stand and balance on a platform while holding on to a handle bar used for steering. Kawasaki says it is "akin to operating water-skis, in that the [user] must use balance and speed to maintain control."

offered to produce Kaneuchi for a deposition the week of January 10, 2000, and pay for all expenses, on the condition that the deposition be finished in one day. Eaton's counsel refused to agree to the time limitation and brought an ex parte motion to compel Kaneuchi's deposition. The motion was granted and the deposition was scheduled and taken on January 12, 2000. The court also granted Eaton's motion to continue the trial. It was reset for February 22, 2000.

Eaton designated two liability experts, Richard Akers and Robert Warren. Eaton continued their scheduled depositions several times, asserting the experts needed more time to complete their work.[2] Eaton finally agreed the depositions would take place on January 27 and 28. However, Eaton changed his mind and, before the depositions, once again requested that they be continued for at least one more week because the experts had not finished their work. Kawasaki refused. The parties dispute whether there was any prearrangement as to who would pay the experts' travel expenses if follow-up depositions were required.

At his deposition, Akers admitted he had conducted and completed tank tests the first week of January 2000 at a Naval facility. However, he claimed he did not have the electronic data, reports, documents or videotapes from that testing. He revealed field testing was scheduled to take place in 10 days. Akers explained the delay was due to his desire to review Kaneuchi's deposition testimony before conducting the field tests because he wanted "to be able to duplicate the testing that Kawasaki did during their design phase to verify or dispute their results." He indicated he had sufficient information from the tank testing to give a "preliminary definitive opinion" but explained

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[2] Akers deposition was first scheduled for December 23. It was continued to December 28, then to January 4, and next to January 14. He was deposed January 27, 2000. Warren's deposition was originally set for January 3. It was continued first to January 12 and finally taken on January 28.

he could not render a final opinion until he had reviewed the field testing results and some documents from the tank testing.

Similarly, Warren was unprepared to render a final opinion. He did not have his notes, reports, documents or videotapes from tests he had conducted in Florida in July 1999. He testified field testing was scheduled to take place in 10 days and he would formulate a final opinion thereafter. Neither expert would reveal where the future field testing would be held because they did not want Kawasaki to spy on them.

Kawasaki requested that the experts be produced for follow-up depositions after they had completed their work. Eaton indicated this would happen only if Kawasaki would pay for the experts' travel expenses from Maine and Virginia. Eaton claimed Kawasaki had previously agreed to pay those costs. Kawasaki denied this and said it would not pay travel expenses.

On February 8, Kawasaki moved ex parte to compel the experts to appear and complete their depositions. Our record does not contain a copy of the court's ruling, but Kawasaki claims the court refused to hear the motions on shortened time. Eaton asserts Kawasaki made "a tactical decision to not resume the depositions."

A few days before trial, Kawasaki filed 25 motions in limine. Number 13 requested an order "limiting the plaintiff's experts to the evidence, statements, arguments, and opinions expressed at the time of their depositions." The court granted the motion, ruling evidence not presented at the time of the experts' depositions would be excluded. The court focused on the fact the depositions were scheduled only three days before the February 1 trial date, and yet the experts were unprepared to render any final opinions. It reasoned, "For a trial judge to permit this to happen is to create an inducement to all counsel in all cases to play this game of not only hiding the ball, of not only not bringing the ball to the deposition, but not even creating the ball at the time of the deposition. That's what happened here. The ball wasn't created."

A jury returned a nine-to-three verdict in favor of Kawasaki. Eaton moved for a new trial on the grounds that the trial was unfair due to the limits placed on his experts and jury misconduct. The motion was denied and Eaton appealed.

II

"'The discovery statutes are intended to safeguard against surprise.' [Citation.]" (*City of Fresno v. Harrison* (1984) 154 Cal.App.3d 296, 301.) The legislature has created an "elaborate scheme regulating discovery of the opinions of experts who will be called at trial. [Citations.]" (*Kennemur v. State of California* (1982) 133 Cal.App.3d 907, 917.) The purpose of those rules "is to permit parties to adequately prepare to meet the opposing expert opinions that will be offered at trial. '"[T]he need for pretrial discovery is greater with respect to expert witnesses than it is for ordinary fact witnesses [because] . . . . [¶] . . . the other parties must prepare to cope with witnesses possessed of specialized knowledge in some scientific or technical field. They must gear up to cross-examine them effectively, and they must marshal the evidence to rebut their opinions." [Citations.]'" (*Jones v. Moore* (2000) 80 Cal.App.4th 557, 565.)

Specifically, Code of Civil Procedure section 2034 provides that before trial, either party may compel the exchange of expert witness lists. (Code Civ. Proc., § 2034.)[3] A party designating an expert must disclose various facts about the expert and represent under penalty of perjury "that the expert will be sufficiently familiar with the pending action to submit to a meaningful oral deposition concerning the specific testimony, including any opinion and its basis, that the expert is expected to give at trial." (§ 2034, subd. (f)(2)(D).)

Moreover, section 2034 specifies where, when, and how experts must be deposed. The deposition of an expert retained or employed by a party must be taken within 75 miles of the courthouse where the action is pending unless there is a showing

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[3] All further statutory references are to the Code of Civil Procedure, unless otherwise indicated.

of exceptional hardship. (§ 2034, subd. (i)(1).) Depositions can be taken as late as 15 days before trial, although counsel may waive the cutoff date. (§ 2024, subd. (d).) Certain experts are entitled to be paid "reasonable and customary" fees for their time spent in the deposition, which must be paid by the deposing party. (§ 2034, subd. (i)(2).) However, "The party designating the expert is responsible for any fee charged by the expert for preparing for the deposition and for traveling to the place of the deposition, as well as for any travel expenses of the expert." (*Ibid.*)

Section 2034, subdivision (j), provides the trial court "shall exclude" expert testimony offered by a party who has "unreasonably" failed to comply with the exchange requirements upon a formal objection made by a party who has complied. This sanction can be imposed when a party has "unreasonably" failed to "(1) List that witness as an expert under subdivision (f). [¶] (2) Submit an expert witness declaration. [¶] (3) Produce reports and writings of expert witnesses under subdivision (g). [¶] (4) Make that expert available for a deposition under subdivision (i)." (§ 2034, subd. (j).)

Kawasaki properly made a formal objection requesting the exclusion sanction before trial, arguing Eaton had unreasonably failed to make his experts available for deposition. (See *Richaud v. Jennings* (1993) 16 Cal.App.4th 81, 90 [motion in limine appropriate means to object].) Kawasaki asserted that at the scheduled depositions, neither expert was able to "submit to a meaningful oral deposition concerning the specific testimony, including any opinion and its basis, that the expert is expected to give at trial." (§ 2034, subd. (f)(2)(D).) Specifically, both experts stated they had not finished their work on the case, did not bring the data or results from previous tank tests, and would not render any final opinions. Moreover, Eaton refused to produce the experts for a follow-up deposition in California, insisting Kawasaki pay for their travel expenses or make arrangements to depose them on the East Coast. Kawasaki asserted that such demands violated the plain language of section 2034, subd. (i)(1) & (2).

Eaton claims it was error for the court to rule he "unreasonably" failed to comply with the expert exchange requirements. He does not deny Kawasaki's allegations, but rather claims his conduct was not "unreasonable" in light of Kawasaki's unreasonable "gamesmanship." We find the court did not abuse its discretion.[4]

Eaton correctly maintains the trial court has the discretion to overlook a party's section 2034 violation. We found several cases holding a trial court may find a party's failure to comply with some aspect of the statute was reasonable in light of the objecting party's conduct. For example in *Stanchfield v. Hamer Toyota, Inc.* (1995) 37 Cal.App.4th 1495, 1503, the plaintiff was advised, when the parties designated their experts that defendant's expert's opinion could be rendered "'upon his review of the conclusions and opinions reached by plaintiff's expert witness.'" (*Ibid,* italics omitted.) However, because the plaintiff's expert witness was deposed the morning before the defendant's expert, there was no time for the defendant's expert to completely develop his opinions. At his deposition, the expert advised plaintiff's counsel he needed approximately 16 hours to complete his work. (*Ibid.*)

In *Stanchfield,* the plaintiff failed to informally request that the expert be produced for a follow-up deposition, did not seek relief from the discovery referee or make a motion in limine to exclude the expert's testimony. (*Stanchfield v. Hamer Toyota, Inc., supra,* 37 Cal.App.4th at p. 1503.) Rather, plaintiff waited until the expert was about to take the stand in the midst of trial to make an objection. (*Ibid.*) The court

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[4] We reject Eaton's contention we must independently review the trial court's ruling. He contends this is the correct standard of review because "there is no meaningful dispute as to the decisive facts relative to the motion" in limine and the only issue is the legal application of section 2034. Not so. In making its ruling, the court was confronted with accusations by both sides of unfair gamesmanship and factual disputes regarding what the parties promised each other during discovery. Pursuant to section 2034, imposition of the exclusion sanction was discretionary, not mandatory. Not surprisingly, in all the authority we reviewed on this topic, including the three cases cited by Eaton, the standard of review is abuse of discretion.

denied plaintiff's motion to exclude the expert testimony "citing [plaintiff's] failure to make reasonable arrangements to continue the deposition or seek appropriate relief before trial." (*Ibid.*) The appellate court upheld the trial court's ruling, finding no abuse of discretion. (*Id.* at p. 1504.)

Eaton argues this case is similar to *Stanchfield.* He claims Kawasaki "made a tactical decision to not resume the deposition and attempt to preclude the plaintiff's expert testimony at trial." Eaton maintains his conduct was not unreasonable in light of the following factors: (1) Eaton's experts were not finished with their work only because Kawasaki unreasonably delayed their expert's deposition by one month; (2) Eaton's counsel's "understanding was that [Kawasaki] would pay for the airplane tickets to complete the depositions, so at most, as to this issue, there was a legitimate misunderstanding between attorneys, and not an unreasonable failure to make the expert available for depositions"; (3) Eaton's counsel requested the depositions be continued and warned Kawasaki the experts had not finished their work; and (4) Eaton's counsel was willing to "permit" completion of the depositions telephonically or fly to the East Coast for the depositions.

Kawasaki disputes many of these contentions. It argues Eaton's experts testified their opinions were not entirely dependent on Kaneuchi's deposition testimony and accordingly their lack of readiness cannot be entirely blamed on Kawasaki. Indeed, the experts had finished tank testing one month before their depositions. They admitted that only the "field testing" was delayed by the problems surrounding Kaneuchi's deposition. Nevertheless, Eaton's experts failed to bring the data or videotapes from the tank testing to the deposition. We do not have a copy of the entire deposition transcript, but Eaton does not dispute Kawasaki's claim that neither expert was willing to render a final opinion after the tank testing.

Moreover, Kawasaki asserts there was no misunderstanding regarding the matter of travel expenses. At the experts' deposition, counsel argued at length about who

should pay the costs of a follow-up deposition. Eaton's counsel stated Kawasaki should pay because it had been warned the experts had not completed their work. Kawasaki's counsel replied it wanted to prepare for trial and needed to obtain whatever information the experts currently possessed. Kawasaki stated it had not previously agreed to pay the experts' travel expenses and was not willing to pay those costs.[5] Kawasaki warned Eaton's counsel that if he failed to produce the experts he would "have to ask the court to either exclude any additional work that's done after today . . . or, in the alternative, compelling [the expert] to appear" at least two weeks before trial.

As for Eaton's request to continue the experts' depositions, Kawasaki maintains the depositions were scheduled three days before the set trial date. Kawasaki explained it had already agreed to several continuances and needed to prepare for trial. It maintains the tank testing was not dependent on Kaneuchi's testimony, and therefore, it could have been completed months before the deposition. Kawasaki argues there was no excuse for the expert's inability to discuss the results of the tank testing or provide copies of the data and videotapes made.

All of this evidence supports the trial court's conclusion Eaton engaged in gamesmanship by not having his experts ready to render final opinions at their scheduled depositions and thereafter refusing to pay costs required by section 2034. Eaton's experts do not come close to measuring up to the expert in *Stanchfield*. Eaton's experts indicated they would need several weeks to complete their work, the reasons they gave for being unprepared were not entirely excusable, and Eaton knew the trial date was rapidly approaching.[6] In short, their "lack of readiness" could reasonably be attributable to

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[5] Eaton snidely comments that the travel expenses "would not have even made a ripple in the defense budget." We are not impressed with this argument. Section 2034 provides the party designating the expert is responsible for travel expenses. The rule is not dependent on whether the deposing party happens to have a deep pocket.

[6] Although there is no statutory requirement for Kawasaki to show it was prejudiced in order to seek the exclusion sanction, we agree with the trial court's

gamesmanship. Moreover, unlike the objecting party in *Stanchfield,* Kawasaki requested that the experts be produced for a follow-up deposition and sought appropriate relief before trial.[7] It was certainly penny wise and pound foolish for Eaton not to pay the expert's travel expenses[8]. In light of all the above, it cannot be said the court abused its discretion in granting Kawasaki's motion in limine.[9]

III

In his notice of appeal, Eaton indicated he was appealing from the trial court's denial of his new trial motion. In his brief, Eaton mentions the standard of review is abuse of discretion. However, as Kawasaki correctly points out, there is no authority or argument addressing the motion for new trial. In Eaton's reply brief, he argues he did not abandon his appeal of this ruling. He explains this is evidenced by the fact he "on numerous occasions[,] makes reference to the pleadings filed in support of his motion for new trial" and cited the relevant standard of review. We are not impressed.

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conclusion that Eaton's tactics in this case were troublesome. With the trial date rapidly approaching, it was inexcusable for Eaton's experts to be unprepared at their depositions. Assuming the field testing took place as scheduled, Kawasaki was left with less than three weeks to depose the experts, obtain the transcripts, and "gear up" for trial with effective cross-examination or evidence to rebut the opinions.

[7] In addition to the motion in limine, the record shows Kawasaki moved ex parte to compel the expert's depositions. However, because there is no evidence in the record indicating whether the court considered or ruled on this motion, we must disregard it. We will not accept either party's unsupported representations regarding the matter.

[8] It is unclear from the record whether Eaton or his counsel is to blame for this shortsightedness. It was an unnecessary risk that turned out to have devastating repercussions. If the decision was attorney driven, Eaton's remedy may lie elsewhere.

[9] In light of this ruling, we need not discuss Eaton's claim the court's ruling was prejudicial or Kawasaki's related argument that Eaton cannot prove prejudice by using juror declarations.

An appellant may not simply make the assertion that a ruling is erroneous and leave it to the appellate court to figure out why. When an appellant raises an issue "but fails to support it with reasoned argument and citations to authority, we treat the point as waived. [Citations.]" (*Badie v. Bank of America* (1998) 67 Cal.App.4th 779, 784-785; see also, *Kim v. Sumitomo Bank* (1993) 17 Cal.App.4th 974, 979.)

In any event, to the extent the motion for new trial was based on Eaton's belief the court improperly limited his experts' testimony, we have discussed in detail why this argument fails. If Eaton also intended that we review the issue of jury misconduct raised in the new trial motion, he was required to explain why the court's ruling was erroneous and provide the court with relevant legal analysis, and authority on this topic.

The judgment is affirmed. Kawasaki shall recover its costs on appeal.

O'LEARY, J.

WE CONCUR:

BEDSWORTH, ACTING P. J.

ARONSON, J.